IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY BETH WASSEM, Pro Se	:	CIVIL ACTION
v.	:	
ROMAC INTERNATIONAL, INC.	:	NO. 97-7825

MEMORANDUM AND ORDER

HUTTON, J. November 30, 1998

Presently before this Court is the Defendant's Motion to Dismiss pursuant to Federal Rule 12(b)(6) (Docket No. 3) and the pro se Plaintiff's response thereto (Docket No. 5). Also before the Court is the pro se Plaintiff's unopposed Motion to Reopen Case (Docket No. 6). For the reasons stated below, the pro se Plaintiff's Motion to Reopen Case is **GRANTED**, and the Defendant's Motion to Dismiss is **DENIED**.

I. PROCEDURAL HISTORY

On July 31, 1996, Wassem filed a charge of employment discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that Romac terminated her on "October 6, 1995" because of her disability in violation of the ADA. Subsequently, the pro se Plaintiff filed an amended charge with the EEOC correcting her termination date to read "October 4, 1995." This correction is significant because soon afterwards the EEOC dismissed her charge for being untimely filed. The EEOC found that

Wassem failed to file her claim within three-hundred (300) days from her alleged wrongful termination as prescribed by the statute of limitations.

Consequently, Wassem initiated the instant action by filing a pro se Complaint on December 17, 1997. This Court dismissed without prejudice this action on April 20, 1998, pursuant to Rule 4(m) of the Federal Rules of Civil Procedure for failing to provide service upon the Defendant within one-hundred twenty (120) days of the date of the filing of the Complaint. Despite this Court's Order, the Defendant moved to dismiss the Complaint on May 4, 1998. On May 11, 1998, the pro se Plaintiff filed the affidavit of Woody H. Murray alleging service was made on the Defendant on April 13, 1998. On May 26, 1998, the pro se Plaintiff filed her response to the Defendant's Motion to Dismiss. On October 19, 1998, the pro se Plaintiff filed a Motion to Reopen Case.

II. BACKGROUND

This case involves claims of discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq. (1994). Defendant, Romac International, Inc. ("Romac"), seeks to dismiss the action under Federal Rules of Civil Procedure 12(b)(6). Because the Plaintiff's Motion to Reopen Case is granted, the Court will consider the motion to dismiss.

The Complaint alleges the following facts, which are viewed in the light most favorable to pro se Plaintiff, Mary Beth

Wassem. Romac, a Florida corporation doing business in the Commonwealth of Pennsylvania and operating an office in Wayne, Chester County, Pennsylvania, is a professional consulting service that provides employment placement services. Wassem, a resident of Strafford, Chester County, Pennsylvania, was originally hired by the Defendant in August 1995 to be a Staffing Consultant in its Philadelphia, Pennsylvania office. In August 1995, Wassem advised both her direct supervisor, Chris DiDomizio (Director of Staffing), and Edward Mega (Vice President of Accounting and Finance division of Romac). In September 1995, Romac's regional headquarters were moved to Wayne, Pennsylvania ("Wayne Office").

One day in September 1995, DiDomizio sent the pro se Plaintiff and two other workers home because of poor air quality in the Wayne office caused by a breakdown of the air conditioning system. Wassem also contends that Mega smoked cigars at his desk in violation of company policy causing her to suffer asthma attacks. Specifically, Wassem asserts that Mega's cigar smoking caused her to suffer an asthma attack on September 15, 1998, that prevented her from running in a half-marathon scheduled for September 18, 1998. Wassem also contends that Mega's cigar smoking caused her to suffer a second asthma attack on October 2, 1998, forcing her to leave the Wayne Office and seek emergency medical treatment at a local hospital.

The pro se Plaintiff alleges that on October 3, 1998, she notified DiDomizio, Mega and Paul Winters (a visiting Vice President from Romac's main offices in Tampa, Florida) of her asthma condition and requested "reasonable accommodation." That is, Wassem claims that she requested the Defendant to enforce its company policy that banned smoking and to investigate the cause of the poor air quality in the Wayne Office. Wassem asserts that DiDomizio told her to go home that day since she was having such a tough time breathing, which she did. Upon returning to work on October 4, 1998, she claims the Defendant, rather than accommodating her asthma condition, replaced her with a person whose credentials where much inferior to her own--even though Mega claimed to have need for someone "heavier." Wassem interprets this phrase used by Mega as meaning someone with more experience. Wassem argues that Mega's explanation for her firing was a mere pretext for the true reason--that she was fired because of her asthma condition--because her qualifications were far superior to her replacement. Wassem alleges that she surpasses her replacement in both education and experience.

III. DISCUSSION

A. Motion to Reopen Case

As stated above, on May 11, 1998, the pro se Plaintiff filed the affidavit of Woody H. Murray, a certified process server, indicating that service had been made on the Defendant on April 13,

1998. Accordingly, this Court is convinced that service was made on the Defendant within 120 days of filing the Complaint pursuant to Rule 4(m). Fed. R. Civ. P. 4(m).

Furthermore, Local Rule 7.1(c) provides that except for summary judgment motions,

> "any party opposing the motion shall serve a brief in opposition, together with such answer or other response which may be appropriate, within fourteen (14) days after service of the motion and supporting brief. In the absence of a timely response, the motion may be granted as uncontested . . . ."

E.D. Pa. R. Civ. P. 7.1(c). On October 17, 1998, the Plaintiff served a copy of this motion on the Defendant. As of the date of this Order, no response by the Defendant has yet been filed. Accordingly, the Court will reopen the instant case and entertain the Defendant's Motion to Dismiss.

B. Motion to Dismiss Case

1. Standard for Dismissal under Rule 12(b)(6)

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Accordingly, a plaintiff does not have to "set out in detail the facts upon which he [or she] bases his [or her] claim." Conley v. Gibson, 355 U.S. 41, 47 (1957) (emphasis added). In other words, a plaintiff need only "give a defendant fair notice

of what the plaintiff's claim is and the grounds upon which it rests." Id. (emphasis added).

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),\[1] this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The court will only dismiss the complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc., 492 U.S. at 249-50 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

Moreover, a pro se complaint must be liberally construed and held to a less stringent standard than formal pleadings. Estelle v. Gamble, 429 U.S. 97 (1976). A pro se action "can only

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3. Rule 12(b)(6) provides that:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

Fed. R. Civ. P. 12(b)(6).

be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " Id. at 106, (quoting Haines v. Kerner, 404 U.S. 519, 521, 92 S. Ct. 594, 596 (1972)).

2. Analysis of Plaintiff's Claims

In the present motion, the Defendant has raised two general issues. First, the Defendant asserts that Plaintiff Wassem failed to file her charge of discrimination with the EEOC within the required three-hundred (300) days from the last incident of discrimination. Second, the Defendant argues that even if this Court finds that the Plaintiff has brought a timely action, Wassem's complaint must be dismissed because it fails to state facts that allege or support an inference of a prima facie case of employment discrimination. The Court will consider each of the Defendant's arguments in turn.

a. EEOC Filing Requirements

The Defendant argues that Wassem cannot maintain her employment discrimination claim because she did not satisfy the statutory filing requirements of 42 U.S.C. § 2000e-5(e), which requires prospective ADA plaintiffs to file charges with the EEOC within 300 days of the alleged discrimination before bringing suit. See 42 U.S.C. § 2000e-5(e) (1994). The ADA adopts the enforcement

scheme and remedies of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17. See 42 U.S.C. § 12117(a). The Civil Rights Act requires a claimant who wishes to bring a civil suit, to first file a charge of discrimination with the EEOC within 300 days of the alleged discrimination. 42 U.S.C.§ 2000(e)-5(e). The timely exhaustion of administrative procedures is therefore a precondition to the maintenance of a civil suit under the ADA. See Brown v. Gen. Servs. Admin., 425 U.S. 820, 832 (1976). The rationale supporting this requirement, according to the Supreme Court, lies in affording the EEOC the "opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party [is] allowed to file a lawsuit." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

Wassem concedes that she failed to file her claim with the EEOC within 300 days of the last alleged discriminatory act by the Defendant. According to Wassem's amendment to her complaint with the EEOC, she was terminated on October 4, 1995. On July 31, 1996, three-hundred one (301) days later, Wassem filed a charge of employment discrimination with the EEOC. Wassem argues, however, that the time limitations of the EEOC are subject to equitable tolling and that such treatment is appropriate in the instant manner.

Timely filing with the EEOC is not a jurisdictional requirement. Zipes v. Trans World Airways, Inc., 455 U.S. 385, 393

(1982). As a mere condition precedent to suit, it is subject to "waiver as well as tolling when equity so requires." Id. The Third Circuit has noted that equitable tolling is particularly appropriate in cases involving "lay persons unfamiliar with the complexities of the administrative procedures." Kocian Getty Refining & Marketing Co., 707 F.2d 748, 754 (3d Cir. 1983) (quoting Hart v. J.T. Baker Chemical Co., 598 F.2d 829, 832 (3d Cir. 1979)); see Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv., 667 F.2d 1074, 1085 (3d Cir. 1981). Because Wassem is not represented by counsel and she failed to file her EEOC claim only one day past the 300 day requirement, this Court finds sufficient justification for equitable tolling.

b. Prima Facie Case Under ADA

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual...." 42 U.S.C § 12112(a). To make out a prima facie case under the ADA, an employee must be able to establish that he or she: (1) has a disability; (2) is a qualified individual; and (3) has suffered an adverse employment action because of that disability. Deane v. Pocono Medical Ctr., 142 F.3d 138, 142 (3d Cir. 1998) (citing Gaul v. Lucent Techs. Inc., 134 F.3d 576, 580 (3d Cir. 1998)). After the plaintiff has met this initial burden, the employer must then produce some legitimate non-discriminatory reasons for the employment decision. Olson v. Gen. Elec.

Astrospace, 101 F.3d 947, 951 (3d Cir. 1996). Once the employer has met this burden of production, the plaintiff must show that the defendant's asserted nondiscriminatory reasons are pretextual. Olson, 101 F.3d at 952; Horth v. Gen. Dynamics Land Sys., Inc., 960 F. Supp. 873, 877 (M.D. Pa. 1997)

The pro se Plaintiff alleges that the disability she suffers from is asthma. The Defendant challenges the pro se complaint solely on the first prong of a prima facie case of employment discrimination under the ADA, that the pro se Plaintiff does not sufficiently allege that she suffered a disability. The Defendant asserts that Wassem does not "allege sufficient facts to establish that her asthma rises to the level of substantially impairing her ability to perform a major life activity."

The ADA defines a "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g). Only the first prong of the definition is at issue in this case. Under the regulations, the ability to breathe is a major life activity. See 45 C.F.R. § 84.3(j)(2)(ii); see also Fehr v. McLean Packaging Corp., 860 F. Supp. 198, 200 (E.D. Pa. 1994) (stating that "[b]reathing is unquestionably a major life function").

The Defendant argues that the Plaintiff's ability to run marathons proves that she could not have been "substantially impaired" in her ability to "breath" or perform any other life activity. Moreover, the Defendant asserts that Wassem's allegations that she suffered two asthma attacks during her entire employment with Romac, which were both triggered by cigar smoke, is not enough to allege a substantially limiting impairment.

The issue of whether Wassem is substantially limited in the major life activity of breathing is admittedly a close one. However, given that a complaint filed by a litigant proceeding pro se must be evaluated using less stringent standards, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), the Court is reluctant to find that it is beyond doubt that Wassem can prove no set of facts in support of her claim which would entitle her to relief. Cf. Geuss v. Pfizer, Inc., No. CIV.A. 94-7059, 1996 WL 729048, at *4 (E.D. Pa. Dec. 17, 1996) (finding that evidence of plaintiff engaging in some exercise did not kill plaintiff's claim that his asthma substantially limited him in the life activity of breathing). Thus, this Court will not dismiss the pro se Complaint for failure to state a claim.

An appropriate Order follows.

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O R D E R

AND NOW, this 30th day of November, 1998, upon consideration of the Defendant's Motion to Dismiss pursuant to Federal Rule 12(b)(6) (Docket No. 3), pro se Plaintiff's response thereto (Docket No. 5) and pro se Plaintiff's unopposed Motion to Reopen Case (Docket No. 6), IT IS HEREBY ORDERED that:

(1) the pro se Plaintiff's Motion to Reopen Case is **GRANTED**; and

(2) the Defendant's Motion to Dismiss is **DENIED.**

BY THE COURT:

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HERBERT J. HUTTON, J.